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No. 98-238

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

TOGO D. WEST, JR.,
SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Petitioner,
v.
MICHAEL GIBSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AS AMICUS CURIAE IN SUPPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE [1]

Amicus Curiae, The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO which represents approximately 600,000 employees of the United States federal government and the government of the District of Columbia.

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, contributed monetarily to the preparation or submission of this brief. Pursuant to Rule 37(3)(a), written consent of the parties permitting the filing of this brief as *amicus curiae* have been obtained and are filed along with this brief.

On behalf of its members, AFGE presents grievances and complaints, including administrative and judicial Equal Employment Opportunity (EEO) complaints, and carries on legislative activity to improve the welfare of the employees it represents. As part of its legislative activity, AFGE was influential in the drafting of the language of the Civil Rights Act of 1991 that is being questioned in this case. Therefore, AFGE files this brief in support of the interpretation that the Equal Employment Opportunity Commission (EEOC) may award compensatory damages and that failure by an employee at the administrative level to request compensatory damages does not bar an award of compensatory damages. As such AFGE joins the Petitioner's contention that the holding below that the EEOC lacks the authority to award compensatory damages should be reversed, and AFGE joins the Respondent's contention that the case should be reversed, and AFGE joins the Respondent's contention that the case should be remanded to the trial level to adjudicate Respondent's claim of compensatory damages.

SUMMARY OF ARGUMENT

1. The EEOC has the authority to order federal agencies to award federal employees compensatory damages for violations of Title VII of the 1964 Civil Rights Act. This authority derives from the Civil Rights Act of 1991, where Congress provided entitlement to compensatory damages for governmental employees, and punitive damages for non-governmental victims of discrimination. Thereafter, and prior to enactment, Congress amended the legislation by adding two words at the request of AFGE. These two words incorporate into the damages section of the new legislation specific reference to the statutory source of the federal employee complaint processing system administered by the EEOC. This exclusive administrative forum for federal sector EEO complaints is governed by the regulations promulgated by the EEOC, which has the statutory authority to provide "appropriate

remedies." The Court of Appeals erroneously ignored the express Congressional amendment, rendering instead the additional terms superfluous.

2. A federal employee is not barred from collecting compensatory damages for failure to explicitly request compensatory damages at the administrative phase since exhaustion of administrative remedies does not include notice of specific, requested relief. Rather, exhaustion of administrative remedies in the federal sector EEO process controlled by the employer/agency merely requires timely notice of the charge and subsequent cooperation and participation, as defined by regulation, in the agency processing of the complaint.

ARGUMENT

I. THE EEOC HAS THE AUTHORITY TO ORDER FEDERAL AGENCIES TO AWARD FEDERAL EMPLOYEES COMPENSATORY DAMAGES FOR VIOLATIONS OF TITLE VII OF THE 1964 CIVIL RIGHTS ACT.

A. The Plain Meaning of the Civil Rights Act of 1991 Authorizes the EEOC To Order Federal Agencies To Award Federal Employees Compensatory Damages in Cases of Unlawful Employment Discrimination as a Result of the "AFGE Fix" Which Caused the Inclusion of Language Into the Text of the Statute Referencing Section 717 of the Civil Rights Act of 1964.

The original draft of the Civil Rights Act of 1991 (CRA 1991) did not contain any reference to Section 717. However, the CRA 1991 as passed into law states in part that

> [i]n an action brought by a complaining party under section 706 *or 717* of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and

punitive damages as allowed in subsection (b) . . . (emphasis added)[2]

The "or 717" phrase is a direct reference to the unique federal employee administrative scheme.[3] This phrase was added at the request of AFGE and is therefore referred to herein as the "AFGE fix." As discussed in detail below, the AFGE sponsored language was intended to amend legislation, which already provided compensatory damages for federal employees, to include direct reference to the EEOC administered complaint processing scheme, thus removing any doubt that EEOC has the power, indeed the responsibility, to award compensatory damages.

On its face, the statutory language neither references judicial nor administrative proceedings. Whether the administrative process is included under the CRA 1991 is established by the plain meaning of the words "action brought . . . under section . . . 717." Two traditional canons of statutory construction aid in this plain meaning analysis. First, when a word has more than one ordinary meaning (such as the word "action"), which ordinary meaning is meant by the statute may be deduced by determining how the same word is used in related or referenced sections and/or statutes. Second, each word and/or section in a statute should be given effect. In other words, the entire "section 717" should be given

[2] Civil Rights Act of 1991, Pub. L. No. 102-166, codified at 42 U.S.C. 1981a(a)(1). Subsection (b) of the CRA 1991 provides that if the respondent is a government, government agency or political subdivision then punitive damages are not recoverable However, there is no such exclusion regarding compensatory damages.

[3] Section 717 of the Civil Rights Act of 1964 is codified at 42 U.S.C. 2000e-16 (1994 and Supp. II 1996) [hereinafter Section 717]. Similarly, Section 706 of the Civil Rights Act of 1964 is codified at 42 U.S.C. 2000e-5 (1994 and Supp. II 1996) [hereinafter Section 706].

effect since the section in its entirety was referenced.[4] "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. U.S.*, 516 U.S. 137, 145 (1995).

Section 717, to which the CRA 1991 now refers, is the section that empowers the EEOC to prevent unlawful employment discrimination. Section 717 tracks the process through which a discrimination charge is brought by a federal employee and considered in the administrative level, and may eventually reach the court system. Throughout Section 717, the word "action" is used in various contexts.[5] In subsection (a), it states that "all personnel

[4] As part of the determination of whether the EEOC has the authority to require federal agencies to award compensatory damages after an EEOC finding of unlawful employment discrimination, the court below "notes" that some of the language contained in the CRA 1991 is ambiguous. *Gibson v. Brown*, 137 F.3d 992, 997 (7th Cir. 1998). The court below questions whether the words "action" is a "federal suit in district court, an EEOC proceeding, or both." *Id.*

When statutory language is ambiguous, courts have turned to the legislative history for guidance. The court below concludes that Congress intended an action brought under Section 717 to be a civil action in district court. The court below errs in its analysis. In support of its holding, the court below cites to various parts of the Civil Rights Act of 1964 which discuss court proceedings. There are three flaws in the court's argument. First, the Congress that passed the original language of Section 717 is not the same Congress that drafted and passed the CRA 1991. Therefore, reviewing the language of Section 717 describes the Congressional intent of an earlier Congress. Second, and more significantly, the court neglects to cite to parts of Section 706 and 717 in which Congress included the administrative process when using the word "action." Lastly, by focusing on the part of Section 717 that refers to judicial proceedings, the court fails to give effect to the entire section. After all, the CRA 1991 does not specify "717 as it relates to civil actions." Rather, it simply states "or 717" which encompasses the administrative process and which itself repeatedly refers to actions in the administrative context.

[5] Section 706 also uses the word "action" to refer to the administrative and judicial process. In subsection (b), it states that the "Commission is authorized to take action with respect to the

actions" by agencies shall be non-discriminatory. In subsection (c), it states that

> within 90 days of receipt of notice of final *action* taken by . . . the Equal Employment Opportunity Commission upon an appeal . . . or after one hundred and eighty days from the filing of the initial charge with . . . the Equal Employment Opportunity Commission . . . an employee or applicant for employment, if aggrieved . . . by the [EEOC's] failure to take final *action* on his complaint may file a civil action as provided in section 2000e-5 of this title. . . (emphasis added)[6]

Thereinafter, the statute refers to judicial proceedings as "civil actions." Thus, the plain meaning of the word "action" in Section 717 includes the administrative process.

Further support for this ordinary interpretation of the words "action brought . . . under . . . 717" can be gleaned from the legislative history. During floor debate, the Danforth/Kennedy Amendment No. 1274 was introduced in the nature of a substitute and eventually passed into law with amendment as the CRA 1991.[7] The Dan-

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charge." In subsection (d) it states that the "Commission shall, before taking any action with respect to such charge . . ." It is only at subsection (f) that the word "action" is used in conjunction with a judicial, non-EEOC proceeding. Specifically, subsection (f) states that in a case against the government, governmental agency or political subdivision, "the Commission shall take no further action and shall refer the case to the Attorney General who may bring civil action . . ." Therinafter, court proceedings are referred to as "actions," "civil actions," and/or "judicial actions." If the Congress that passed the original Section 706 intended the word "action" to refer to court proceedings only, then including the words "civil" or "judicial" actions would be redundant.

[6] *See also supra*, fn 5 (discussion of use of word "action" in Section 706 which is cross referenced in Section 717. Section 706 also uses term "action" in reference to EEOC proceedings).

[7] 137 Cong. Rec. S28846 (daily ed. Oct. 29, 1991).

forth/Kennedy Amendment provided compensatory damages in cases of intentional discriminaton. The availability of compensatory damages was limited only by the size of the employer and capped at $300,000. There is no prohibition of the recovery of compensatory damages from the government. The Danforth/Kennedy Amendment also provided for punitive damages, stating "a complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision)." Thus, it is clear that the original bill provided compensatory and punitive damages in cases of intentional discrimination with the exception that punitives were not to be available against the government. Stated positively then, the bill already provided compensatory damages against the "government, government agency, or political subdivision" even prior to the subsequent "AFGE fix."

During the discussion regarding the Danforth/Kennedy Amendment, Senator Warner suggested that he wanted an amendment that would include federal employees in the damages section.[8] In response, Senator Kennedy announced that it was his understanding, as well as Senator Danforth's understanding, that federal employees were included in the damages provisions in the Danforth/Kennedy Amendment.[9] The language of the Danforth/Kennedy Amendment was broad enough to include not only private employees, but also government employees. To wit, the language stated that a "complaining party" could bring action for compensatory damages and that if a "complaining party" seeks such damages then "any party" may request a trial by jury. "Complaining party" and "any party" includes federal employees.

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[8] 137 Cong. Rec. S28880 (daily ed. Oct. 29, 1991) (statement of Senator Warner).

[9] 137 Cong. Rec. S28880 (daily ed. Oct. 29, 1991) (statement of Senator Kennedy).

Senator Kennedy continued, stating that he believed it would help "ensure" that federal employees are covered "by adding explicit language referring to section 717 and the Rehabilitation Act." Senator Kennedy asserted that he was "hopeful we will be able to make the kind of adjustment needed to make the coverage of federal employees even clearer . . . by adding section 717 of the Civil Rights Act as well as comparable ADA provision." Later during the discussion, Mr. Warner returned to the floor to re-emphasize his belief that the Danforth/Kennedy Amendment omitted federal employees from benefitting from the damages section. Mr. Warner then explained that he sought to assure federal employees "the same protections that the underlying legislation provides for other private sector citizens in employment situations."[10] He further explained that without the amendment, approximately three million federal employees would be left without full remedies and that he wished to thank the American Federation of Government Employees for bringing attention to this matter. Thus the proposed amendment to the Danforth/Kennedy bill as initially conceived was intended to clarify and ensure that federal employees—who are required to first exhaust administrative remedies—may be awarded compensatory damages not only as designed in the Danforth/Kennedy bill but throughout the entire 717 process.[11]

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[10] 137 Cong. Rec. S28898 (daily ed. Oct. 29, 1991) (statement of Senator Warner).

[11] Senator Mikulski then spoke on behalf of the yet unwritten amendment proposed by Senator Warner and the AFGE. During her short statement, Senator Mikulski explained that the amendment will bring parity to private sector and federal employments in part because the "amendment will make it possible for a jury to award compensatory damages to Federal employees." 137 Cong. Rec. S28889 (daily ed. Oct. 29, 1991) (statement of Senator Mikulski); *see also* 137 Cong. Rec. S29022 (daily ed. Oct. 30, 1991 (statement by Ms. Mikulski). Her statement was general and limited to the notion of parity. This may explain why she was silent as to the issue of an award of compensatory damages for employees through administrative proceedings.

On October 30, 1991, Senator Warner sent Amendment 1292 to the desk for immediate consideration.[12] The purpose of Amendment 1292 was to "clarify that federal employees may recover damages for intentional employment discrimination and to allow damages for intentional discrimination under the Rehabilitation Act fo 1973."[13] Three out of the seven changes made by Amendment 1292 added the words "or 717" to the text of the Danforth/Kennedy Amendment. Senator Warner began his explanation of what the amendment was designed to accomplish with a brief description of the federal discrimination complaint process. During this description Senator Warner reminded the Senate that federal employees were required to first submit their action for EEOC examination.[14] Senator Warner then jumped into the "heart of the matter" which

> is the manner in which the [federal] employees are compensated in cases of intentional discrimination. Remedies available under present law include:
>
> One, reinstatement; two, back pay; three, restoration of benefits; and four, public notice.
>
> My amendment would add to the list of remedies compensatory damages including those covering pain and suffering, and that is a very important subject.[15]

At no point in Senator Warner's explanation of the amendment did he exclude compensatory damages from being awarded at the administrative level. Quite the contrary, Senator Warner stated that the compensatory damages were to be added to a list of damages that the EEOC

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[12] 137 Cong. Rec. S29020 (daily ed. Oct. 30, 1991) (statement of Senator Warner).

[13] *Id.*

[14] 137 Cong. Rec. S29021 (daily ed. Oct. 30, 1991) (statement of Senator Warner).

[15] *Id.*

is entitled to award. Furthermore, Senator Warner never referred to the specific subsections in 717 that refer only to judicial proceedings. Instead, Senator Warner focused on Section 717 as a whole, which includes EEOC proceedings and directs EEOC to enforce "through appropriate remedies." [16]

It is clear from the legislative history that the CRA 1991 as passed was intended to award federal employees the remedy of compensatory damages in judicial proceedings. It is also clear that Congress intended for the "AFGE fix" to verify that remedy at the judicial level and add that remedy to the administrative level. Four senators in total spoke directly about the amendment. All addressed the notion of parity between private employees and federal employees. At no point of the Congressional debate did any senator state that action at the EEOC level was not included in the amendment. The senators never explicitly limited their discussion regarding Section 717 to the subsections within that address only judicial proceedings. Additionally, at no point did any senator suggest that compensatory damages are not an appropriate remedy for the EEOC to grant.[17] If the senators wished to limit the EEOC's grievances, they could have amended this through the CRA 1991. Yet the plain language of the CRA 1991 does not limit the EEOC from granting "appropriation remedies" because the word "action" includes administrative action and because Congress intended compensatory damages provided for in the CRA 1991 to reach federal employees at the administrative level.

Moreover, the amendment to the CRA 1991 should not be now nullified by a reading that renders the language

[16] Section 717(b).

[17] Section 717(b) grants the EEOC the right to grant "appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. . . ."

meaningless. Rather, any statutory interpertation should begin "with the assumption that Congress intended each of its terms to have meaning." *Bailey*, 516 U.S. at 145. Congress had already provided damages for civil rights violations of a compensatory (but not punitive) nature to federal employees. The subsequent amendment referencing the federal sector process contained in Section 717 must have done something more. "We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Id.* at 146. If federal employees are denied the right to recover compensatory damages in the comprehensive administrative process established by the EEOC under the authority of Section 717, then "the AFGE fix" would be merely superfluous statutory language.

B. The EEOC Has Permissibly Interpreted the Words "Actions Brought . . . Under Section . . . 717" To Include Actions Brought at the Administrative Level. When an Agency Interprets in a Permissible Manner Statutory Language That It Is Entrusted To Administer, the Court Shall Then Defer to the Agency's Construction.

After the passage of the CRA 1991 in late November, 1991, the EEOC first awarded compensatory damages to a federal employee in the 1992 decision of *Jackson v. Runyon, United States Postal Service.*[18]

In *Jackson,* the EEOC analyzed whether the Postal Service appropriately canceled Jackson's complaint when he rejected an offer of full relief. The EEOC defines full relief as "relief that would have been available to appellant had he prevailed on every issue in his complaint." [19] In determining full relief, the EEOC relied on the CRA

[18] *Jackson v. Runyon, United States Postal Service*, 93 FEOR 3062, EEOC Appeal No. 01923399 (Nov. 12, 1992). See also Staudmeister, Comment: *Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 Am. U.L. Rev. 189, 192-194 (1996).

[19] *Jackson, supra* note 18, at 3 (cite omitted).

1991 that "makes compensatory damages available to federal sector complainants in the administrative process."[20] The EEOC based their interpretation of the CRA 1991 "upon a thorough examination of the statute's language and policy considerations." [21] The EEOC found that the term "action" refers to both court and administrative proceedings. The EEOC noted that during a Senate debate on the CRA 1991, an amendment used the term "action" to mean administrative action.[22] The EEOC limited the awarding of compensatory damages for alleged conduct occurring after the effective date of the CRA 1991. Since the Postal Service did not address the issue of compensatory damages where the complaint showed "objective evidence that he or she has incurred compensatory damages," [23] the EEOC concluded that full relief was not really offered.

Since *Jackson*, the EEOC has repeatedly awarded compensatory damages to federal employees whose complaints of unlawful employment discrimination are found to be meritorious and caused by intentional discrimination, with injuries proven to be caused by the unlawful discrimination. As this Court instructed in *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984),[24] an agency's interpretation of a law it administers should be granted deference and upheld if the agency's interpretation is permissible. In order to determine permissibility, the court must first review the Congressional intent and if clearly articulated, the court must then effectuate Congressional intent.[25] However, when Congressional intent is ambiguous or inferential because "Congress has not directly addressed the precise question at issue," [26] then it is not for the court to "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." [27] Instead, the court next reviews whether the agency's construction is reasonable, i.e., not "arbitrary, capricious or manifestly contrary to the statute." [28]

20 *Id.*

21 *Id.*

22 *Jackson, supra* note 18, at 5 fn. 5.

23 *Id.*

24 *See also Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue,* 523 U.S. 382 (1998) (holding applies the principles of *Chevron*).

25 *Chevron, supra* at 842-843.

As discussed above,[29] Congress intended that the compensatory damages provision be applicable to federal employee actions. However, in the alternative, the court must next examine whether the EEOC's construction is reasonable. In determining reasonableness, the court need not find that the EEOC's construction is the same as the court would have held had the matter been first presented to the court.[30]

The EEOC's determination that they could require compensatory damages as part of the relief offered a federal complainant upon a finding of unlawful discrimination is

26 *Id.* at 843.

27 *Id.* (footnote omitted).

28 *Id.* (citations and footnotes omitted).

29 See *supra* pages 9-11.

30 *Chevron, supra* at 843 fn. 11. The court below complains that the award of compensatory damages at the administrative level would cause conflicts with the section that provides for a jury trial. As this Court has acknowledged, "deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'" *Id.* at 844 quoting *U.S. v. Shimer,* 357 U.S. 374, 382 (1961). If the court below is correct that the subsections are in conflict, it is the province of the EEOC, which has a fuller understanding of the nuances of the grievance scheme to square the conflicts.

neither capricious, arbitrary nor contrary to the CRA 1991. First, this construction is consistent with the ordinary meaning of the statute. The CRA 1991 extended the damages provisions in cases of employment discrimination to include compensatory damages and referenced Section 717. Second, the EEOC already had the authority under Section 717 to award any appropriate remedy not specifically prohibited within the title. Compensatory damages were not specifically prohibited in the legislative history or in the language of the CRA 1991, or by the original title. Third, the legislative history underscores the congressional intent to grant federal employees greater protection against civil rights violations. The EEOC's construction of the CRA 1991 grants greater protection to federal employees and as such is consistent with the unambiguous congressional intent and policy considerations.[31]

Fourth, the EEOC would be severely limited in enforcing anti-discrimination provisions if it were unable to fully grant all relief entitled to a complainant. It would render the EEOC in essence a lame duck agency. The EEOC as part of its functions, adjudicates as well as mediates disputes between employers and employees which may result in voluntary conciliation agreements and/or settlements between the parties.[32] The negotiation process would be hampered if all remedies are not available. Complainants would be required to exhaust the administrative remedy, but would in any event go forward to judicial proceedings for the compensatory damages.[33]

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31 *Id.* at 863 ("more importantly, the history plainly identifies the policy concerns that motivated the enactment; the plantwide definition [i.e. the administrative construction] is fully consistent with one of those concerns . . .").

32 *See* Staudmeister, *supra* note 18, at 201 (Title VII emphasized employer/employee conciliation).

33 *See id.* at 194.

Fifth, finding that compensatory damages are not available through the EEOC is counter to the policy considerations made by the drafters of CRA 1991. When discussing the motivation behind "the AFGE fix," Senator Wirth described federal employees as "second-class citizens" who have not been afforded the "same rights, not given the same redress, not given the same remedies as other individuals in this society."[34] He explained that the amendment assures federal employees that at the very least, they will be "treated equitably and treated fairly and not treated with the back of the hand or as second-class citizens" with respect to remedies. Federal employees are required to grieve through the EEOC. If the EEOC is restricted from awarding compensatory damages, then the federal employees will have to process their claims once under Part 1614 and then re-file in federal district court before they can even seek compensatory damages. In other words, their ability to even ask for full relief from unlawful discrimination will be continued until after the formal agency process with agency counseling, agency investigation, adjudication by an administrative judge from the EEOC, final agency decision, and appeal to EEOC's Office of Federal Operations. Such a protracted limbo would cause federal employees to remain the second-class citizens that the Congress warned against.

For the above mentioned reasons, the EEOC's construction allowing an award of compensatory damages by the EEOC is permissible and should be bestowed deference. The EEOC acted within its authority in 1992 when it determined that the CRA 1991 extended the damages provision to the formal federal sector administrative process.

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34 137 Cong. Rec. 29021 (daily ed. Oct. 30, 1991) (statement of Senator Wirth).

II. RESPONDENT IS NOT BARRED FROM COLLECTING COMPENSATORY DAMAGES FOR FAILURE TO EXPLICITLY REQUEST COMPENSATORY DAMAGES AT THE ADMINISTRATIVE PHASE SINCE (a) EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIRES NOTICE TO THE EMPLOYING AGENCY OF THE ALLEGED DISCRIMINATORY ACT(S) BUT NOT OF SPECIFIC RELIEF AND (b) IT IS THE EMPLOYING AGENCY THAT DIRECTS THE COMPLAINT PROCESS AND BEARS THE BURDEN OF INQUIRY INTO THE SPECIFIC RELIEF.

The federal employee administrative process is described at 29 C.F.R. Part 1614 and requires the employing agency to, *inter alia,* administer both a pre-complaint conciliation process and a post-complaint formal investigative and adjudicative process. Exhaustion includes placing an affected agency on notice of the facts surrounding the alleged discriminatory event. However, a federal employee is not required to place an agency on notice of the specific, requested relief due to the alleged wrong. Indeed, under traditional civil rights analysis, a victim of discrimination is presumptively entitled to full make-whole relief following a timely complaint proven to be true. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 422 (1975).

Federal employees are required to exhaust their administrative remedies. In *Brown v. GSA,* 425 U.S. 820 (1976), this Court held that Section 717 requires federal employees to exhaust the administrative process before filing suit in federal district court. Section 717 does not describe the degree of specificity with which the presentation of the grievance at the administrative process must be offered.[35] As a result, the question of what constitutes exhaustion of administrative relief and sufficient notice to agencies has been left open.

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[35] *President v. Vance,* 627 F.2d 353, 355 (D.C. Cir. 1980).

The courts have tended to find the exhaustion requirement satisfied when the complaint meets the time requirements, submits a complaint to the affected agency and/or EEOC, and cooperates with the affected agency during the process set forward in the regulations promulgated by the EEOC governing the EEOC complaint process for the federal sector, namely Part 1614.[36]

One purpose of exhaustion is to place the affected agency on *notice* of the factual allegations. The circuits are inconsistent as to what constitutes adequate notice. There are many points at which the complaint may place the agency on notice. The written complaint submitted to the agency is one of the mechanisms by which the complainant may place the agency on notice. The EEOC guidelines specify that the complainant (or the complainant's attorney) must submit a signed statement that identifies (1) the aggrieved individual, (2) the agency, (3) the actions or practices that are alleged to be discriminatory, and (4) contact information for the complainant or representative.[37] Often, a standard complaint is supplied or available from the agency.[38] The guidelines contained in the EEOC regulations do not require the complainant to identify any damages in the written complaint submitted to the agency.

The EEOC has recognized that requests for damages need not necessarily contain specific language.[39] Similarly,

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[36] Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* (3rd ed. 1996) at 57; *see also Wade v. Secretary of the Army,* 796 F.2d 1369, 1377 (11th Cir. 1986) ("Good faith effort by the employee to cooperate with the agency . . . and to provide all relevant, available information is all that exhaustion requires.").

[37] 29 C.F.R. 1614.106(c) (1996).

[38] Lindemann and Grossman, *supra* note 36, at 29 fn. 86.

[39] Ernest C. Hadley, *A Guide to Federal Sector Equal Employment Law and Practice* (11th ed. 1998) at 1538.

courts that have reviewed whether the complaint has given the agency sufficient notice have recognized "the fact that EEO complaints are to be liberally construed."[40] In *President v. Vance*, the D.C. Circuit held that failure to plead specific remedies at the administrative phase is not necessarily failure to provide notice to the affected agency and therefore is not failure to exhaust administrative remedies.[41] In *President*, the federal employee, Mr. President,

[40] *Brown v. Marsh*, 777 F.2d 8, 15 (D.C. Cir. 1985) ("we have suggested that notice may be adequate where a claim is brought to the agency's attention . . . even if the argument or claim is not clearly set out in the complaint."); *Young v. National Center for Health Services Research*, 828 F.2d 235 (4th Cir. 1987) ("we are mindful of the traditional rule that EEO pro se complaints are to be liberally construed . . . and for this reason we do not think it fatal to her case that Dr. Young's administrative complaints did not use the precise words 'constructive discharge.'").

[41] *See also* 29 C.F.R. 1614.106 which charge both employing agency and EEOC with duty to afford victims of discrimination full relief regardless of what complainant writes in the corrective action on initial EEO complaint form.

In *Fitzgerald v. Secretary, U.S. Department of Veterans Affairs*, 121 F.3d 203 (5th Cir. 1997), the court held that allowing the employee to raise a claim for compensatory damages for the first time in U.S. district court would thwart the purpose of requiring administrative exhaustion of claims. However the court then narrowed this requirement when it stated that an agency must be "put on notice of fears that may justify an award of compensatory damages" and then "the burden shifts to the employing agency to investigate the claim for compensatory damages." The court comments begs the question of whether notice of the facts surrounding the existence of a discriminatory act may be enough to satisfy notice of facts that may justify an award of compensatory damages. The court reiterated the principle that the language used by the complainant need not be technical or legal.

Additionally, the facts in *Fitzgerald* are distinguishable from *President* which may have led to the different conclusions. In *Fitzgerald*, the employee failed to act with due diligence and cooperation with the agency. When the agency offered full relief, Fitzgerald did not respond in a timely manner. Such action, in and of itself, is equal to failure to exhaust administrative remedies. Hadley, *supra* note 39, at pg. 1539.

alleged that he was given a poor performance evaluation due to racial discrimination.[42] Mr. President met with the agency's equal employment counselor and then filed a formal administrative complaint.[43] In the complaint Mr. President requested three remedies which included the elimination of "the present unwritten policy in CU to eliminate, downgrade or prevent the promotion of Minority Officers. . . ."[44] Mr. President did not specifically request in the complaint promotion nor backpay. The agency investigator found support for Mr. President's allegations of discrimination and the agency forwarded proposed remedies.[45] Mr. President accepted the finding of discrimination but rejected the agency's proposed relief. Instead he requested, in addition to the original requests in his complaint, promotion and backpay. Mr. President asked the agency for a final decision. Mr. President also instituted suit in the District Court and pled for, among other things, promotion and backpay.

The D.C. Circuit in its review of President's case, found that the complaint's mention of the unwritten policy to prevent promotion to minorities was adequate notice to the employing agency. Additionally, the court pointed out that the employing agency had been told before the issuance of its final decision and that too was sufficient notice. *President* thus holds that notice of requested damages does not have to be given with specificity nor at any particular time before the agency's final decision. The D.C. Circuit also reviewed pertinent legislative history and case law regarding the application of Title VII to the private sector. This review seems particularly pertinent now after the passage of CRA 1991, wherein Congress

[42] *President*, *supra* note 35, at 356-359.

[43] *Id.* at 357-358.

[44] *Id.* at 358.

[45] *Id.*

attempted to equalize the private sector and federal sector. The court noted that

> [b]y insisting in Section 717(c) that a complaining employee seek relief within his agency in the first instance, Congress made certain that the agency would have the opportunity as well as the responsibility to right any wrong that it might have done. Congress did not, however, intend to erect a massive procedural roadblock to access to the courts.[46]

The D.C. Circuit also cited to this Court's ruling in *Love v. Pullman Co.* in which was stated that the exhaustion requirement should not be understood to create technicalities that "are particularly inapproriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[47] Based on this assertion in *Love* and the Congressional intent behind Section 717, the D.C. Circuit reasoned that

> [i]t cannot reasonably be expected that a lay complainant will always phrase his prayer for relief so narrowly as to leave no question about what he seeks . . . . Once discrimination has been demonstrated, a respectable part of the burden of fashioning suitable relief must shift to the discriminating agency lest the ultimate goal of Title VII be frustrated.[48]

Thus, exhaustion by the employee relates to notice of the discrimination, not the remedies. After all, all issues of damages stemming from discrimination are reasonably related to that discrimination.[49] Therefore, once put on

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[46] *Id.* at 362.

[47] *Id.* quoting *Love v. Pullman Co.*, 404 U.S. 522 (1972).

[48] *Id.* at 362-363.

[49] *See* Lindemann and Grossman, *supra* note 36, at 1567 ("courts have . . . limited the scope of a judicial complaint to those issues that could have reasonably been expected to grow out of the administrative complaint.").

notice of an alleged discriminatory act, it is the agency that has the burden of inquiring after the specific relief. In this way, the employee who has been discriminated against may be made whole.

There are multiple references in Part 1614 to the responsibilities of the affected agency in the grievance process. Part 1614 creates a progressive complaint system that requires the affected agency to lead, direct and control much of the complaint process. For example, the regulations require that each federal agency designate equal employment opportunity personnel who shall make written materials regarding administrative and judicial remedial procedures available to employees who allege employment discrimination.[50] Additionally, the regulations require the employee to first approach the agency in a "pre-complaint" stage that involves informal resolution.[51] During this stage, the complainant meets with a counselor who "must advise individuals in writing of their rights and responsibilities, including . . . . the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in pre-complaint counseling for issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency."[52] These are just two examples of the burdens which EEOC regulations place on the employing agency to advise the employee. If the complainant does not know to specify his or her required relief, it is the agency's duty to inform. Further, the agency is required to advise the complainant from the initial stages that any issues which are related to the alleged discriminatory act will be considered in future proceedings. Damages, even unspecified, are issues related to the alleged discriminatory act. Therefore, unspecified damages should not be barred in a subsequent complaint filed with the agency.

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[50] 29 C.F.R. 1614.102(b)(3-4) (1996).

[51] 29 C.F.R. 1614.105 (1996).

The second stage of the complaint process is the submission of a formal complaint to the agency.[53] Once accepted, an agency investigator investigates the complaint. The permitted scope of the investigation is broad. The investigator is not required to limit the investigation to the specific allegations made by the complainant.[54] Common sense dictates that if the investigator has the authority to inquire beyond the specific allegations of discrimination, he or she also has the authority to investigate into the details of alleged discrimination including any possible damages that may have resulted from the alleged wrong.

At the conclusion of the agency investigation, the employee has the right to either request a final decision from the agency or a hearing before an administrative judge at the EEOC. At any time during this process, the employing agency may fully resolve the complaint by offering relief. Recently, through rulemaking, EEOC has proposed to reform Part 1614 to add a Rule 68-like "offer of resolution" that would protect an agency from further fee liability in the event a proper offer of judgement and relief is rejected by the complainant.[55]

The EEOC has held that an employee may place an agency on notice for his or her request for (compensatory) damages at almost any stage of the administrative process.[56] This flexible and non-rigid holding is consistent

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[52] 29 C.F.R. 1614.105(b) (1996).

[53] 29 C.F.R. 1614.106 (1996).

[54] Lindemann and Grossman, *supra* note 36, at 1551; *see also* 29 C.F.R. 1614.108 (1998).

[55] 63 Federal Register 8594, February 20, 1998.

[56] Hadley, *supra* note 39, at pg 1540. In *Mary L. Square v. Brown*, 95 FEOR 3018 (EEOC Comm., 08/25/94), the Commission noted that it generally did not consider compensatory damages claims raised for the first time in a Request For Reconsideration of a decision of EEOC's Office of Federal Operations (OFO). However, the Commission concluded that, if the case had to be remanded on other grounds, it would be appropriate for such a claim

with the assumptions made in the statutory scheme: (1) that the agency has the authority to investigate all of the issues related to the alleged discriminatory act, (2) that the agency has more resources and access to evidence than the employee, and (3) that many employees are lay people and not necessarily knowledgeable about their rights. To require an employee to give notice to an employing agency of specific relief assumes a more sophisticated employee than the statutory and regulatory scheme intended. It also assumes that the employee has equal resources as the agency, an assumption that is clearly inaccurate.

Since the employee does not direct or control the administrative process, he or she should not have the burden of requesting specific relief. Part and parcel of the control granted to the agency is the burden of inquiring after the specific relief that may arise out of the complaint. Placing the burden on an employee to request specific damages would require a sophisticated complaint and in essence, would require the employees to always seek legal advice. This requirement would make the system adversarial when it is currently not designed as such. The federal EEO structure is designed to be conciliatory.[57] Placing the burden on the agency, however, would not hinder the requirement of exhaustion of administrative remedies since the agency and/or EEOC may pursue any form of relief as it relates to the discriminatory act of which the employee is already required to give notice. That is why a federal employee does not fail to exhaust his or her administrative remedies by failing to request compensatory damages during the agency processing of, or EEOC review of, the discrimination claim and thus is not barred from addressing it at trial.

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to be addressed. Reconsideration of a decision from OFO is the absolute last stage of the comprehensive administrative complaint processing system found in Part 1614.

[57] See supra page 14.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be reversed, with instructions that the case be remanded to the District Court for a determination of compensatory damages.

Respectfully submitted,

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